Fair Political Practices Commission

M E M O R A N D U M

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
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Date: June 25, 2003

Subject: Adoption of Regulation 18531.5 – Recall Elections

A. Summary. At its March 7, 2003, meeting, the Commission approved a revised fact sheet about recall elections. The revision updated the 1999 version to include statutory changes made to the Act by Proposition 34. At the March meeting, Chairman Getman requested that staff codify in a regulation pertinent advice contained in the recall fact sheet.

Regulation 18531.5 has two primary objectives:

(1) To clarify how the contribution and expenditure limits added by Proposition 34 apply to state candidates in a recall, following section 85315.

(2) To codify current FPPC advice as to reporting requirements for candidates and committees in recalls at the state and local level.

The impetus for updating the fact sheet and codifying advice concerning recalls was the pending effort to recall the Governor. This regulation, however, concerns rules that are broadly applicable to recalls. It is contemplated that specific questions which are unique to candidates and committees involved in the current gubernatorial recall attempt can be handled in the advice letter context rather than addressed in this regulation.

B. Recalls. Recall is the power of the voters to remove a sitting elected officer. (California Constitution Article 2, sections 13-19, and Elections Code sections 11000 et seq.) Recall elections are unique because they have characteristics of both a ballot measure and a candidate election. In a recall election, there are two separate questions being presented to the voters. The first is "should the elected official be removed from office?" Thus, the recall measure qualifies for the ballot through a signature gathering process like an initiative measure, and is defined as a "measure" under the Act. If the recall succeeds, the second question is selecting a replacement candidate in what is akin to a special election to fill a vacancy.

Amendments to Article 2 of the State Constitution in 1994 changed how recalls work in California. Prior to 1994, the vote on whether to remove an elected official from office, and if the recall

succeeded, the subsequent election to choose a successor candidate, were held separately. Amendments to Article 2 and the Elections Code consolidated recall elections and the choice of a replacement candidate to the same ballot and permitted recalls to be consolidated with an upcoming regularly scheduled election.[1] These changes were intended to save the expense of holding two separate elections and to prevent a period of vacancy in the office if a recall succeeds.[2]

Under the Act, a somewhat different set of rules applies to ballot measure elections than to candidate elections. Because recall elections are a hybrid between a ballot measure and a candidate election, recalls have given rise to numerous questions of interpretation for the FPPC in the past. In addition, Proposition 34 added section 85315, a provision specifically addressing recalls.

C. Application of State Contribution Limits to State Recall Elections. The proposed regulation in subdivision (b) states whether the various parties to a state recall – the target officer, the replacement candidates, and proponent and opponent committees, are subject to the contribution and voluntary expenditure limits.

1. Target of Recall. As to the target of a state recall, the regulation follows section 85315 and states that the contribution limits of the Act do not apply to contributions accepted by the target elected officer into a committee established to oppose the recall. Similarly, it states that the expenditure limits do not apply to expenditures made by the target to oppose the recall.

Section 85315 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to oppose a recall:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

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[1] Cal. Const. Art. 2, § 15, amended by Stats. 1994 Res. ch. 59 (S.C.A. 38 (Prop. 183) approved November 8, 1994); Elections Code §§ 11381-11386.

[2] 1994 ballot arguments and legislative analyst's estimate of fiscal impact concerning Proposition 183, a constitutional amendment on recall elections put on the ballot by the Legislature.

The statute and regulation are consistent with past FPPC advice stating that the target of a recall is not subject to contribution limits in his or her efforts to oppose the recall. (E.g., *Pringle* Advice Letter, No. A-89-155; *Roberti* Advice Letter, No. A-89-358; *Roberts* Advice Letter, No. I-89-570.)

2. Replacement Candidates. As to replacement candidates, the regulation in subdivision (b)(2) states that because these individuals are "candidates" who are seeking elective state office, the contribution limits of Chapter 5 of the Act do apply. Section 82007 of the Act defines a "candidate" as follows:

> "'Candidate' means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. 'Candidate' also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. 'Candidate' does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971."

The Act's definition of "candidate" is broad and includes both the replacement candidates and the elected officer who is the subject of the recall.

Proposition 34 enacted contribution limits applicable to candidates for elective state office. Among the limits in Chapter 5 of the Act, section 85301 restricts contributions from persons to state candidates as follows:

- $ 21,200 per election to "any candidate for Governor" (§ 85301(c));
- $ 5,300 per election to "any candidate for statewide elective office" except a candidate for Governor (§ 85301(b));
- $ 3,200 per election to "any candidate for elective state office" other than a statewide candidate (§ 85301(a)).[3]

[3] The amount of the contribution limit is adjusted every two years based on changes in the Consumer Price Index. These adjusted limits apply for elections occurring between January 1, 2003, and December 31, 2004.

The replacement candidates in a state recall election are "candidates" within the meaning of section 82007, who are seeking election to state office. Under a plain meaning interpretation of the Act, the contribution limits of Chapter 5 apply to replacement candidates in a state recall election.

Unlike the contribution limit schemes preceding it (Propositions 73 and 208), Proposition 34 contains a specific provision concerning recalls. As discussed above, section 85315 expressly provides that an elected state officer who is the target of a recall effort may accept contributions to oppose the recall without regard to the contribution limits of Chapter 5. Neither section 85315, nor any other section of the Act, however, exempts the individuals who are seeking state office as replacement candidates from the contribution limits. The fact that Proposition 34 specifically exempts the target of a recall from the contribution limits, but is silent as to the replacement candidates, argues that the Act's contribution limits do apply to replacement candidates. The Commission ratified this interpretation at its March 8 meeting, when adopting the fact sheet, and to date we have not received any negative comments about this interpretation.

3. Committees Primarily Formed to Support or Oppose a Recall. For committees formed to support or oppose a recall, the regulation in subdivision (b)(3) states that because a recall falls within the Act's definition of "measure," the contribution and voluntary expenditure limits of Chapter 5 do not apply. Section 82043 defines a "measure" as follows:

> "'Measure' means any constitutional amendment or other proposition which is submitted to a popular vote at an election by action of a legislative body, or which is submitted or is intended to be submitted to a popular vote at an election by initiative, referendum or recall procedure whether or not it qualifies for the ballot."

Accordingly, the FPPC has usually analyzed recall elections following the rules applicable to ballot measures, rather than those applicable to candidate elections. The Supreme Court case *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, stands for the proposition that contribution limits do not apply in ballot measure elections. In that case, the Court struck down a Berkeley ordinance placing a $250 limit on contributions to support or oppose ballot measures as violating First Amendment rights of association and expression. The Court reasoned that the usual justification for contribution limits – preventing corruption or the appearance of corruption of a candidate or an elected official – was not present in the ballot measure situation, and that ballot measure elections involve issue discussion. (*Id.* at 297-298.) It is important to observe, however, that *Citizens Against Rent Control v. Berkeley, supra,* did not discuss recall elections or classify recall elections as ballot measures. The case only analyzed "non-candidate" controlled ballot measure committees, and emphasized the differences between "issues" that appear on the ballot and candidate elections.

Because recalls fall somewhere in-between a ballot measure and a candidate election, a statutory scheme could reasonably classify them either way. Section 82043 of the Act, however, includes recalls within the definition of "measure," and therefore the FPPC's interpretation has proceeded under that framework. Accordingly, the FPPC has consistently advised that the contribution limits of the Act do not apply to proponents or opponents of a recall measure.

D. Campaign Report Filing Obligations of Candidates and Committees Involved in a Recall. Having clarified how the Act's contribution limits apply to candidates and incumbents involved in state recalls, the second objective of the regulation is to give guidance to the parties involved in recalls about their campaign report filing obligations. In subdivision (c), the regulation emphasizes that all candidates and committees that are raising and spending funds in connection with a recall election have full reporting and disclosure obligations under the Act.

For a state or local elected official who is the target of a recall, the regulation provides that he or she may use a committee for the office held to oppose a recall, or may establish a separate committee to oppose a recall upon receiving a notice of intent to recall the officer. (§ 85315; *Hong* Advice Letter, No. A-89-133; *Roberts* Advice Letter, No. I-89-570). However, if a state officeholder who is the target of a recall accepts contributions to oppose the recall in any committee, other than a separate recall committee created pursuant to section 85315 or a committee otherwise not subject to Proposition 34 limits, the applicable contribution limits and post-election fundraising restrictions of Proposition 34 will be in effect. If the target officer establishes a separate recall committee, the regulation requires that the word "recall" be included in the name, consistent with section 84107 and the instructions to the Form 410 – Statement of Organization. Because a target officer opposing a recall is not seeking a new elective office, the regulation provides that the officer is not required to file a new candidate intention statement (Form 501) under section 85200.

The regulation states that a replacement candidate may form a committee to seek elective office in a recall at any time, and unlike the target officer, is required to file a candidate intention statement (Form 501) under section 85200. The regulation further provides that the disclosure obligations of committees primarily formed to support or oppose a recall are triggered when the proponent serves the target of the recall with the notice of intention to circulate a recall petition pursuant to Elections Code section 11021.

The comment to the regulation provides additional specifics as to the campaign reports required by committees active in a recall (codifying filing advice in the *Higdon* Advice Letter, No. I-94-189). The second paragraph of the comment recognizes local ordinances such as San Diego's municipal code which classifies recalls as candidate elections and imposes local contribution limits on all committees participating in a recall. State campaign finance law provides some deference to local governments to enact additional campaign finance regulation applicable in that jurisdiction. Under section 81013, a local jurisdiction is not prevented from imposing additional requirements on any person if the requirements do

not prevent the person from complying with the Act. In addition, section 81009.5 provides that local jurisdictions may not impose additional or different filing requirements from those in Chapter 4 of the Act, unless the additional or different requirements apply only to candidates or committees active only in that jurisdiction. Further, the additional or different reporting requirements may not be inconsistent with the provisions of the Act. The *Angus* Advice Letter, No. A-97-173, concluded that state law did not preempt the City of San Diego's local ordinance in its application of contribution limits to all participants in a recall.

E. Recommendation. Staff recommends that the Commission adopt regulation 18531.5 which interprets section 85315 and codifies advice about reporting by candidates and committees involved in recalls.

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